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IN THE

Supreme Court of the United States

October Term, 1991

Hon. ROBERT M. MORGENTHAU,

Petitioner,

- against -

CLIFFORD RANDALL,

Respondent.

PETITION AND APPENDIX FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

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February 19, 1992

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QUESTIONS PRESENTED

1. Whether, in the absence of intentional governmental misconduct, the Double Jeopardy Clause of the United States Constitution bars retrial of a criminal defendant who, on incorrect information, has decided after consultation with counsel to abort his trial and enter a plea of guilty, and who later withdraws that plea?

2. Whether a state court is free to reject the holding of United States v. Tateo, 377 U.S. 463 (1964), in construing the Double Jeopardy Clause of the United States Constitution?

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- v. -

CLIFFORD RANDALL,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF APPEALS OF THE STATE OF NEW YORK

To the Honorable Chief Justice and the Associate Justices of the Supreme Court:

PRELIMINARY STATEMENT

Robert M. Morgenthau, the District Attorney of New York County, State of New York seeks a writ of certiorari to review a November 21, 1991, order of the Court of Appeals of the State of New York.

OPINIONS BELOW

The opinion of the New York Court of Appeals, dated November 21, 1991, concluding that the Double Jeopardy Clause of the United States Constitution prohibited respondent's criminal prosecution is reported at 78 N.Y.2d 494, 577 N.Y.S.2d 211, 583 N.E.2d 924 (Pet. App. 1 - 16). The opinion of the Appellate Division, First Department, of the Supreme Court of the State of New York which granted a petition against further prosecution under New York CPLR article 78 is reported at 161 A.D.2d 70, 560 N.Y.S.2d 409 (Pet. App. 20 - 58).

JURISDICTION

The Order of the Court of Appeals was entered on November 21, 1991. This Court's jurisdiction is being invoked under 28 U.S.C. section 1257 (a).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V of the United States Constitution, provides, in pertinent part:

> ... nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; ....

Amendment XIV, Section 1, of the United States Constitution, provides, in pertinent part:

> ... nor shall any state deprive any person of life, liberty, or property, without due process of law ....

STATEMENT OF THE CASE

A. The Events Leading to the Guilty Plea

Respondent Clifford Randall was charged with attempted murder and other offenses for shooting Edward Warner, Jr., a childhood acquaintance, "seven times with an automatic weapon" (R26, R86).[1] In June, 1989, Randall, represented by counsel, proceeded to a jury trial presided over by Justice Harold Rothwax (R27, R35).

The jury informed the court that it might be deadlocked (R35). Thereafter, at an unrecorded bench colloquy following the jury's dinner, Justice Rothwax informed Randall's attorney that based upon

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[1]Page references preceded by "R" are to the Record on Appeal to the Court of Appeals of the State of New York. Copies can be forwarded to the Court if requested.

"speculation," which the judge thought might be "reliable," the jury could be split ten to two for conviction (R35, see Pet. App. 3).[1] Reminding Randall's attorney that one could not be "sure" of

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[1]In the petition, Randall alleged that the judge "did not indicate how [he] came into possession" of the information (R27). In a motion before the judge to dismiss on double jeopardy grounds, Randall conceded that the judge said the following about the information: "[Y]ou can never know for sure and this was speculation" (R35). The record does not reveal that the judge gave the basis of his information. Nor does it reflect that he was asked to give the basis, and refused to do so. In an account never contradicted by respondent Randall, Justice Rothwax explained, when he later denied a motion to dismiss the indictment based upon double jeopardy grounds that he had asked a court officer "if everything went all right with the jury at dinner" (R77). The officer replied that there were no problems, but observed that, based upon how the jurors interacted with one another, he believed that the jurors "had split into two camps, one group of ten jurors and one group of two jurors" (R78). The "attitude" of the jurors towards each other had given the officer the "sense that the majority were for conviction" (R78).

the "speculation" (R35), the judge asked if a plea bargain might be possible. The attorney, aware of the strength of the evidence that had been presented to the jury, conferred with Randall. Randall decided to enter a plea of guilty to one count of Criminal Use of a Firearm in the First Degree, under the third count of the indictment (R27, see Pet. App. 3-5). This decision was made after the judge convinced the prosecutor to agree to a sentence for this lesser offense that was less than the term the prosecutor had been willing to accept prior to trial (R36).[1]

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[1]The plea of guilty also "covered a violation of probation which was then outstanding against" Randall (R79).

B. The Motion to Withdraw the Guilty Plea and the Motion to Dismiss the Indictment

After the jury was excused, Randall's attorney discovered that the jury had been "split" ten to two for acquittal rather than conviction (R42, R43). Randall moved to withdraw the plea of guilty. He now claimed that Justice Rothwax had "improperly imparted" information to Randall's attorney (R27-R28, R35).

On July 26, 1989, Justice Rothwax, as "an act of discretion," permitted Randall to withdraw his plea of guilty (R46). The judge observed that "[c]ounsel may have been misled, inadvertent to be sure, but misled by the Court nevertheless" (R46). The case was adjourned for Randall to seek new counsel and for a new trial (R47-R50).

New counsel moved to dismiss the indictment, claiming that a retrial would

violate the Double Jeopardy Clause (R51). The essence of the motion was that the judge had engaged in "improper conduct ... in coming into possession, and then passing along, information from a Court officer with regard to the direction and voting" of the deliberating jury (R54). According to Randall, the "improperly passed along" information had "induced" Randall to plead guilty (R54), and he had lost his "right to have a particular tribunal decide his fate" (R57). Randall conceded that he was "not claiming intentional misconduct" (R58); rather, he likened the situation to a decision to plead guilty "under false pretenses" (R58).

On December 5, 1989, Justice Rothwax denied the motion to dismiss. After reviewing the events leading to Randall's

plea of guilty, the judge observed that it had probably been "ill-advised" to communicate what he had heard from the court officer (R81). However, the judge continued, given that the jury had declared itself deadlocked and given that the information had been volunteered by the court officer, the judge had brought it to the attorney's attention "basically to guide him in whatever action he wanted to take, not to produce any particular result" (R81a). Noting that there was no "pressure" by the court to make Randall plead guilty (R81c), nor any allegation of "improper motives" (R81c), the judge denied the motion.

C. The CPLR Article 78 Petition

Randall then brought a proceeding under CPLR article 78 in the Appellate

Division, First Department to prohibit a new trial based "upon Double Jeopardy and Due Process grounds" (R26) under both the "State and Federal Constitutions" (R29). Once again, the premise of the claim was that the judge's improper conduct was in "taking improperly received information from a Court officer and passing it along to the respective parties" (R29). According to Randall, this "set off a series of events that cannot be remedied" (R29).

In answer, respondent Morgenthau conceded the facts as stated by Justice Rothwax in his oral decision of December 5, 1989, denying the motion to dismiss (R87). Noting that "no allegation of malice or bad faith" had been made (R87), respondent Morgenthau argued that United States v. Tateo, 377 U.S. 463 (1964),

required that the petition be dismissed (R90-R92).

D. The Decision of the Appellate Division, First Department

On September 6, 1990, the Appellate Division granted the petition (Pet. App. 17-19). The court viewed the matter as turning on whether Randall's decision to plead guilty had been a "knowing and intelligent waiver of the defendant's right to have his case decided by the first impanelled jury" (Pet. App. 33-34). The court, in turn, observed that that determination rested on whether the decision to plead guilty had been "coerced" (Pet. App. 35). The court then stated that a "review of the record leaves us with no doubt that the defendant's guilty plea was coerced, perhaps inadvertently, but coerced nonetheless"

(Pet. App. 35-36). Finding that there was "every indication that the defendant, satisfied with the way the trial had gone, would have left his case with the jury had the court not led him to believe that his confidence in the jury was seriously misplaced" (Pet. App. 38-39),[1] the court concluded that Randall had been deprived of the opportunity to have the empaneled jury decide his fate (Pet. App. 45).

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[1]The court pointed to nothing that had been alleged by Randall from which the conclusion could be drawn that, at the time of the deliberations, Randall was "satisfied" with the way his trial had gone (Pet. App. 38, 40). In no sworn document had Randall or his attorneys alleged that up to the time of the deliberations the defense had been "satisfied" with the trial. The only suggestion of such came in the supplemental memorandum of law filed by Randall's new attorney in connection with the article 78 petition. Buried in that document, to which the state was not entitled to respond, was the single sentence: "The trial had gone very well" (R101).

The court rejected United States v. Tateo, 377 U.S. 463 (1964), as controlling authority. First, it concluded that it was "difficult to square Tateo with prior decisions of the Supreme Court," including Downum v. United States, 372 U.S. 734 (1963), and Green v. United States, 355 U.S. 184 (1957), "nor ... easy to reconcile Tateo with subsequent Supreme Court doctrine," such as United States v. Dinitz, 424 U.S. 600 (1976), and United States v. Jorn, 400 U.S. 470 (1971) (Pet. App. 46-47). Second, it purported to find a distinction between the threat of the judge in Tateo to increase a sentence, and the misinformation of the instant judge that suggested an acquittal was unlikely. Because the court found the circumstances "so thoroughly eclipsed" Randall's "option to proceed" to verdict (Pet. App. 50), the

court found that Randall's rights under the Double Jeopardy Clauses of the federal and state constitutions had been violated and granted the petition (Pet. App. 58).

E. The Decision of the Court of Appeals

The Court of Appeals affirmed the conclusion of the Appellate Division, but specifically limited its determination to the Double Jeopardy Clause of the federal Constitution (Pet. App. 1). The court concluded that the case was "not controlled by any particular precedent" (Pet. App. 6); rather, it based its conclusion "under elemental double jeopardy principles" (Pet. App. 6). The court emphasized that it was a defendant's "entitle[ment]" to have a "particular jury" decide his fate (Pet. App. 7).

The court held that the judge's "inadvertent error" during deliberations was insufficiently remedied under the Double Jeopardy Clause by a vacatur of the guilty plea because the "particular jury" entitlement was lost to respondent Randall (Pet. App. 7). The court refused to follow United States v. Tateo, 377 U.S. 463 (1964) because it concluded that "subsequent Supreme Court cases cast considerable doubt" on the vitality of Tateo (Pet. App. 11). Rather, the court concluded that a judge's inadvertent mistake which leads to a defendant's decision to abort his own trial is the equivalent of a judge's sua sponte declaration of a mistrial in the absence of manifest necessity over a defendant's objection (Pet. App. 11-12).

REASONS FOR GRANTING THE WRIT

The writ should be granted for two reasons. First, the correctness and continuing vitality of the determination in United States v. Tateo, 377 U.S. 463 (1964), is in judicial dispute, and, therefore, an inequity in the application of Tateo to United States citizens exists. Second, the New York Court of Appeals, an influential court, has demonstrated a fundamental misunderstanding of the Double Jeopardy Clause.

A. The dictates of United States v. Tateo, 377 U.S. 463 (1964), are not being applied equally among United States citizens

Nearly three decades ago, in United States v. Tateo, 377 U.S. 463 (1964), the Court responded to the countervailing policy concerns between society's need to insure that the guilty are punished and a

defendant's desire for adjudication of his or her guilt by a particular group of jurors. There, the Court was faced with a defendant who decided to plead guilty during trial after the federal judge threatened an enhanced sentence if he were to be convicted by the sitting jurors. At that time, the Court found no Double Jeopardy bar to retrial even though the guilty plea was coerced by the judge's conduct. The Court held that, though a plea of guilty may be invalid as coerced if a defendant terminates the trial to plead guilty, the Double Jeopardy Clause does not bar retrial, at least absent willful governmental intent to obtain the plea of guilty to avoid what is perceived otherwise to be an acquittal.

Thirty years later, in the instant matter, the New York Court of Appeals

rested its determination solely and completely on the Double Jeopardy Clause of the United States Constitution. In so doing, it concluded that Tateo is no longer viable precedent. Although a lower New York court tried to distinguish Tateo, New York's highest court candidly recognized that no convincing distinction could be made.[1] Instead, it held that Tateo was no longer viable as continuing precedent because "subsequent ... cases" had "cast considerable doubt" on it. Thus, the only basis for the New York interpretation of the federal Constitution is that Tateo is no longer 'good law.'

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[1]The thin reed on which the lower court in New York seemed to rest was that the New York judge's unintentional error concerned what the likely verdict of the jury would be while the federal judge's purposeful threat did not. New York's highest court did not accept that distinction.

Plainly, the competing policy concerns discussed in Tateo -- society's need to punish the guilty versus a defendant's desire for adjudication by a particular jury -- remain in tension to this day, and this Court's discussion of those policy issues in the Tateo decision are often quoted. As recently as 1988, in Lockhart v. Nelson, 488 U.S. 33 (1988), the language in Tateo was relied upon in the majority and dissenting opinions. 488 U.S. at 34 (Rehnquist, C.J.); 488 U.S. at 42 (Marshall, J., dissenting). And, the Court quoted from Tateo's discussion of society's interest in punishing the guilty just a year earlier. Montana v. Hall, 481 U.S. 400, 402-03 (1987). That the policy tensions persist to this day, however, does not resolve how they should be balanced and whether the balance achieved

in Tateo's holding remains, thirty years later, the correct one.

As pointed out above, Tateo dealt with two competing principles relevant in this area of Double Jeopardy Clause jurisprudence. On the one hand are those cases in which the criminal defendant's "valued right to have his trial completed by a particular tribunal" has been emphasized, Wade v. Hunter, 336 U.S. 684, 689 (1949), and in which the defendant's right to retain control over the course to be followed in the event of prosecutorial or judicial error vis a vis the petit jury has been promoted, United States v. Dinitz, 424 U.S. 600 (1976); United States v. Jorn, 400 U.S. 470 (1971); Downum v. United States, 372 U.S. 734 (1963).

On the other hand are those cases in which the Court has noted society's

important interest in punishing the guilty and the need to avoid having every trial error confer an immunity against retrial. Burks v. United States, 437 U.S. 1 (1978); United States v. Ball, 163 U.S. 662 (1896). The Court has thus observed that a rule entitling the defendant "to go free if the trial fails to end in a final judgment" would:

> create an insuperable obstacle to the administration of justice in many cases in which there is no semblance of the type of oppressive practices at which the double-jeopardy prohibition is aimed .... [A] defendant's valued right to have his trial completed by a particular tribunal must in some instances be subordinated to the public's interest in fair trials designed to end in just judgments.

Wade v. Hunter, 336 U.S. at 688-689.[1]

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[1]What is of significance here is that, though the jury was leaning towards acquittal rather than conviction, there is no reason to conclude that the jury would

(continued...)

Therefore, the general rule that has been fashioned is that a jury trial terminated prior to verdict at the behest of or with the consent of the defense does not bar retrial. Oregon v. Kennedy, 456 U.S. 667, 672 (1982); United States v. Dinitz, 424 U.S. at 607-610.

Tateo had represented a point at which the tension is poignant -- a defendant who terminates his or her trial as a result of some sort of governmental conduct which makes that course more palatable than risking the jury's verdict. Tateo resolved that tension against the criminal defendant and in favor of the society's interest in a full guilt determination. If the result in Tateo was correct, no different result should have occurred

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[1](...continued)
have ultimately been anything other than deadlocked.

here. With a parallel opportunity to address the competing interests presented nearly three decades ago now before this Court and with citizens now being treated differently in different states, this Court should return to this area of federal Double Jeopardy jurisprudence and resolve whether policy interests call for a revised interpretation of the federal Constitution -- the path that New York has taken.

Certainly, a number of jurisdictions have no problem in accepting Tateo's result, and reject efforts to apply a Double Jeopardy bar in the absence of intentional misconduct designed to avoid an expected acquittal. For example, California recently applied the Tateo result to the improvident discharge of a jury. People v. Moore, 1 Cal.App.4th 546,

2 Cal.Rptr. 2d 231, 1991 Cal.App. LEXIS 1388 (Ct.App. 1991). Likewise, Rhode Island and Arkansas also recently have found no reason to question the Tateo result in the face of claims of prosecutorial misconduct. State of Rhode Island v. Diaz, 521 A.2d 129 (R.I. 1987); Timmons v. State of Arkansas, 290 Ark. 121, 717 S.W.2d 208 (1986).

On the other hand, New York is not the only court to question Tateo, or to conclude that a Double Jeopardy claim may arise in the absence of malevolent intent. At least one federal trial judge has asserted that the holding of Tateo does not survive this Court's later precedent. Scott v. Jones, 688 F.Supp. 510, 518 n.20 (W.D. Mo.), reversed for other reasons, 862 F.2d 1311 (8th Cir. 1988), cert. denied, 490 U.S. 1111 (1989). And, like

New York, Arizona has suggested that even in the absence of malevolent intent, a defendant who perceives that the judge has intimidated him or her to abort a trial might have a valid Double Jeopardy claim. City of Tucson v. Valencia, 21 Ariz. App. 148, ___, 517 P.2d 106, 109 n.5 (1973). Maryland has wrestled with other aspects of Tateo's resolution of the competing policy concerns surrounding pre-verdict trial terminations. See Jones v. State of Maryland, 44 Md.App. 417, 409 A.2d 725 (1979).[1]

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[1]We note that both the Arizona and Maryland discussions took place prior to the Court's 1982 opinion in Oregon v. Kennedy, which states a test of an intent to provoke the defense to terminate the trial, 456 U.S. at 674. In a sense, that statement of the test begs the question in this case. Certainly, here, as in Tateo, the judge intended to convey the information and certainly the motivation might be that the defendant might decide to plea guilty rather than risk a jury

(continued...)

A basic inequity of treatment, based upon a fortuity of geographical presence, therefore exists concerning whether the Double Jeopardy Clause of the United States Constitution prevents the reprosecution of persons who decide to abort their trial under circumstances in the absence of intentional governmental misconduct designed to avoid an acquittal. By concluding that Tateo is no longer 'good law' under the federal Constitution, New York will, under the guise of federal jurisprudence, undercut and eviscerate society's interests in promoting a process

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[1](...continued)
verdict. Arguably, then, there is an intent to provoke a termination of trial prior to verdict. The issue here, and it was the same issue in Tateo, is whether there is a constitutional impropriety if there is no evil intent to avoid an expected acquittal.

that leads to an adjudication of guilt or innocence.

B. New York has fundamentally misunderstood the Double Jeopardy Clause

It is certainly unusual for certiorari to be granted simply to correct an error of a state court. However, even apart from any consideration of the national application of Tateo, New York's misunderstanding cries out for correction. The New York Court of Appeals is a highly respected court, and its views are sure to be influential. The New York Court of Appeals has taken it upon itself to reject precedent of this Court, on which this Court has recently continued to rely. The New York Court of Appeals has supported its conclusion on nothing more than its view of "elemental double jeopardy principles" (Pet. App. 6).

We believe that Tateo was correctly decided, that it should have been controlling here, and that this Court should speak to New York's fundamental misunderstanding of the Double Jeopardy Clause. Tateo does not dilute protections against prosecutorial or judicial conduct that is malevolent, or that is intended to avoid an unfavorable verdict. Indeed, that is what we see as the policy behind this Court's opinion in Oregon v. Kennedy. We believe that the precedent of this Court leads to a bright-line rule that, absent purposeful misconduct malevolently intended to prejudice the defendant's "valued right," there should be no Double Jeopardy bar to further prosecution simply because circumstances provide the defense with a "Hobson's choice" or, in other words, "no choice"

but to seek a mistrial or otherwise terminate the trial before verdict. United States v. Dinitz, 424 U.S. at 610. Nothing in Tateo or in any other precedent of this Court suggests anything different.

The approach of the New York Court of Appeals, however, leads in a strikingly different direction. First, that approach finds "coercion" of a trial termination where there is nothing more than "inadvertent error." Second, it finds governmental intent to be irrelevant to Double Jeopardy Clause analysis where a trial is terminated with defense counsel's acquiesence. At bottom, the New York Court has concluded that the federal Constitution bars further prosecution where a trial is terminated by a counseled defense decision to plead guilty due to an "inadvertent error" of fact.

Such an approach leads to a serious dilution of society's interest in having guilt determined by juries and in having the guilty punished. There is no practical difference between a defendant who pleads guilty due to a judge's factual mistake and a defendant who moves for a mistrial due to a judge's legal error. In both cases, the defendant may view himself or herself with no choice but to abandon the jury that he or she selected and to lose the "valued right to have [the] trial completed by a particular tribunal."

The New York Court of Appeals is a highly respected court in this country. If its faulty understanding of the federal Constitution is allowed to proceed uncorrected, other courts will likely follow. Without doubt, Double Jeopardy jurisprudence has not always traveled in a

straight line. United States v. Di Francesco, 449 U.S. 117 (1980). This new path needs to be averted; it is a path that has properly been rejected. It simply cannot be that the federal Constitution ratifies the conclusion that in the absence of malevolent conduct a counseled defendant who admits his guilt ends up being immunized from criminal prosecution.

CONCLUSION

The petition for a writ of certiorari should be granted. The Court should either (a) summarily vacate the judgment below, hold that United States v. Tateo, 377 U.S. 463 (1964) remains controlling authority and remand for further consideration or (b) direct full briefing and argument on the issues presented in this petition.

Respectfully submitted,

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